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5 **UNITED STATES DISTRICT COURT**
6 **WESTERN DISTRICT OF WASHINGTON**
7 **AT SEATTLE**

8 CHARLES W. WEBER,

9 Petitioner,

10 v.

11 STEPHEN SINCLAIR,

12 Respondent.

Case No. C08-1676RSL

ORDER DENYING IN PART
FEDERAL HABEAS PETITION AND
GRANTING EVIDENTIARY
HEARING

13 **I. INTRODUCTION**

14 This matter comes before the Court on petitioner's third amended federal habeas petition
15 (Dkt. #70). Petitioner identified six grounds for relief from his state court conviction. Magistrate
16 Judge Theiler prepared a Report and Recommendation (R&R) (Dkt. #92) which recommended
17 that this Court deny the petition.

18 As explained below, the Court adopts the R&R as to grounds for relief one through four
19 and six. The Court however does not adopt the R&R as to the fifth ground for relief due to
20 petitioner's newly asserted claim under Martinez v. Ryan, 132 S. Ct. 1309 (2012). See Objection
21 (Dkt. #95) at 3. As the Court finds that petitioner has satisfied Martinez, the Court grants an
22 evidentiary hearing limited to petitioner's ineffective assistance of counsel (IAC) ground for
23 relief. The Court however dismisses the petition as to the remaining five grounds for relief.

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ORDER DENYING IN PART FEDERAL
HABEAS PETITION

II. DISCUSSION

A. Background

The Washington State Supreme Court summarized the factual background as follows:

¶ 4 Early morning on March 18, 2003, law enforcement responded to a report of bullet-riddled sport utility vehicle (SUV). Gabriel Manzo Vazquez, the vehicle's owner, reported the shooting took place when he was attending a party at the apartment of his friend, Rhonda Encinas. While at the party, Vazquez met three men: Nick Renion, "Andreas," and a man who went by the moniker "Guero Loco." He and Renion began arguing, and at some point during the argument, Guero Loco pulled a semiautomatic handgun on Vazquez. Vazquez ran into a bedroom where Victor Garcia-Rodriguez was watching television. Vazquez jumped out of the bedroom window and ran to his car. Vazquez alleged that Guero Loco shot at him several times as he drove away. One of the bullets grazed his abdomen.

¶ 5 Vazquez described Guero Loco as a white male in his 20s, about five feet six inches tall, very skinny, and with a shaved head. Vazquez also described Guero Loco as having a “206” tattoo on the back of his neck, though he did not describe the size of the tattoo. Based on this information, a deputy looked through the department’s database for anyone named “Guero Loco.” Not finding a record of anyone with that name, the deputy entered the term “loco,” resulting in a list of 10 or 12 names. He found petitioner Weber associated with the term “Weta Loco” and also determined that Weber had a “206” tattoo on the back of his neck. Clerk’s Papers (CP) (June 10, 2003) at 111 (*State v. Weber*, 159 Wash.2d 252, 149 P.3d 646 (2006)). The deputy opined that “Wedo Loco” and “Guero Loco” were the same. CP at 110–11.

¶ 6 Later that same day, another deputy stopped Weber for failing to stop at a stop sign. Weber was driving a gray sedan. The deputy noticed Weber had “LOCO” tattooed across his fingers and “206” tattooed on the back of his neck. “Wedo Loco” was also tattooed on the side of Weber’s neck. After confirming probable cause for arrest, the deputy arrested Weber. A search of the car incident to the arrest uncovered “baggies” of cocaine. A subsequent search of the car uncovered information regarding Rhonda Encinas.

¶ 7 Weber was interviewed at the sheriff's office and was informed that he had been arrested for a shooting at a party. Weber claims he assumed he was arrested for drugs. He declined to give a statement and was transported to the King County Jail. Weber's booking photo shows that he had short dark hair, was five feet seven inches tall, and weighed 165 pounds.

¶ 8 Vazquez was shown a photo montage. He selected Weber with 80 percent certainty but could not be sure without seeing the tattoos.

¶ 9 Garcia-Rodriguez, whose bedroom Vazquez fled through, was interviewed by a detective at Encinas's apartment the next day. He permitted the detective to examine the apartment and take photographs. Garcia-Rodriguez stated that Weto Loco¹ was at the party that night but did not see Weto Loco with a gun. He also stated the shooter left in a gray car. He identified Weber from a photomontage. Garcia-Rodriguez did not testify at trial.

¶ 10 A detective spoke with Encinas the following day. She was uncooperative and provided no useful information. Encinas was served with a subpoena to appear for trial. Although the detective obtained a material witness warrant, Encinas was not apprehended on the warrant and she never showed up to testify.

¶ 11 The State did not locate or interview Renion even though he was considered a possible accomplice and was arrested on an unrelated matter during the investigation. "Andreas" was also not located or interviewed even though he was reported to be Encinas's and Renion's cousin. The sheriff's office neither searched Weber's residence nor sought to have him tested for gunpowder residue. The firearm in this case was never found.

¶ 12 The State charged Weber with attempted first degree murder, first degree assault, first degree unlawful possession of a firearm, and unlawful possession of cocaine with intent to deliver. Weber pleaded guilty to the cocaine charge before trial on the other charges. Weber asserts that defense counsel urged him to accept a plea on the shooting charges but that he refused because he was innocent. Defense counsel interviewed Vazquez but did not interview Encinas or Renion. He did not locate or interview Andreas. Weber asserts that while his attorney mentioned Renion to him, he did not mention the name Andreas.

¶ 13 Vazquez was the only direct eyewitness to the shooting to testify at trial. He testified that he arrived at Encinas's house around 8:00 p.m. and the shooting occurred sometime between 3:30 a.m. and 5:00 a.m. Vazquez testified that the shooter went by the nicknames "Guero Loco" and "Boxer" and that he had met him once before at Encinas's apartment. He testified that Guero Loco left the party about a half hour after arriving. Guero Loco then returned, staying at the party until the shooting.

¶ 14 According to Vazquez, there were six people in the apartment at the time of the shooting: himself, Encinas, Renion, Guero Loco, Andreas, and Garcia-Rodriguez. Vazquez admitted he had about nine beers but was not drunk. He and Renion got into an

¹ [Washington State Supreme Court footnote] This spelling is found in the transcript of the interview; Garcia-Rodriguez did not provide this spelling. State's Resp. to Pers. Restraint Petition, App. D.

1 argument, and Encinas tried to intervene but was pushed aside. Vazquez testified that
 2 Guero Loco then pulled out a semiautomatic handgun, pointing it at him. Vazquez stated
 3 he ran to the bedroom and then jumped out of the window to get to his car. He stated he
 4 was backing up his vehicle when Guero Loco ran downstairs. Vazquez testified that he
 5 saw Guero Loco load a magazine into the gun with his right hand, while holding the gun
 6 with his left hand, and that Guero Loco then started shooting at him with one of the
 7 bullets hitting his stomach.

¶ 15 Vazquez testified that he was 80 percent certain that the man he picked from the photomontage, Weber, was the shooter. He said he could not be sure without seeing the tattoo on his neck. Vazquez identified Weber in the courtroom, testifying he was the shooter. But Vazquez noted that Weber's hair was different. During closing arguments, defense counsel reminded the jury that Weber's hair was the same at trial and in the photomontage.

¶ 16 Jennifer Martini testified for the State, stating she called 911 on March 18, 2003, around 3:00 a.m. after she heard gunshots from her balcony. She testified that she saw a dark SUV driving away, and a few minutes later she saw a second vehicle, a light colored, four-door sedan, follow the SUV. The State admitted exhibits of Vazquez's SUV and Weber's gray sedan. Martini identified the SUV as the first vehicle she saw on the night of the shooting, and she testified that the gray sedan was similar to the second vehicle she saw that night.

¶ 17 Stephanie Fisher, Weber's cousin and alibi witness, testified that Weber was with her all night. The State impeached her with a previous conviction for impersonation and inconsistencies between her trial testimony and her interview the detective.² She then testified that Weber went out twice that evening. Fisher attributed her inconsistent statements to the detective's intimidating behavior. She also explained that there was a portion of her interview that was not recorded and that she had her 15-month-old baby on her lap during the entire interview.

¶ 18 The jury found Weber guilty of the lesser degree crime of attempted second degree murder, first degree assault, and first degree unlawful possession of a firearm. The trial court vacated the assault conviction on double jeopardy grounds. On direct appeal the Court of Appeals reversed, holding that the trial court should have vacated the attempted second degree murder conviction instead. *State v. Weber*, 127 Wash.App. 879, 112 P.3d 1287 (2005), *aff'd*, 159 Wash.2d 252, 149 P.3d 646 (2006). On remand, the trial court

² [Washington State Supreme Court footnote] During her interview with the detective, Fisher initially stated Weber was with her all evening. But after the detective warned Fisher about the risk of being found guilty of perjury and that such a conviction could be used against her in her child custody battle, Fisher admitted Weber went out a couple of times during the evening.

1 imposed a sentence for the first degree assault conviction. Weber filed a PRP in the Court
 2 of Appeals, which was dismissed. *In re Pers. Restraint of Weber*, No. 60449-0-I
 3 (Wash.Ct.App. Mar. 21, 2008). We denied discretionary review of that dismissal.³ *In re
 Pers. Restraint of Weber*, No. 81579-8 (Wash. Sept. 29, 2008).

4 ¶ 19 More than one year after the judgment and sentence became final, Weber filed the
 5 instant personal restraint petition in this court. Weber maintains he is innocent of his first
 6 degree assault and firearm conviction and claims defense counsel was ineffective. The
 petition is supported by several declarations.

7 ¶ 20 Consideration of Weber's petition was stayed pending our decision in *Carter*, 172
 8 Wash.2d 917, 263 P.3d 1241. That decision is now final. In *Carter* we recognized "actual
 9 innocence" as a form of equitable tolling of the time limit on personal restraint petitions.
 In light of *Carter*, Weber contends that based on the new evidence supporting his
 10 innocence, this court should equitably toll the statutory one year time limit on his PRP to
 consider his constitutional ineffective assistance of counsel claim. He also contends we
 11 should recognize a constitutional free-standing claim of actual innocence.

12 In re Weber, 175 Wn.2d 247, 250-254 (2012).

13 B. Procedural History

14 Magistrate Judge Theiler summarized the procedural history of petitioner's habeas corpus
 15 petition as follows:

16 There is no dispute about the procedural history. Mr. Weber is a Washington-state
 17 prisoner who is serving life without the possibility of early release because while
 18 incarcerated he received a third strike for assaulting another prisoner. (Third Am. Pet., at
 1; SCR, Exhs. 1, 2, 3.) His current federal habeas petition concerns his 2003 conviction
 19 in King County Superior Court for attempted murder, assault, a firearms count, and a
 VUCSA count.

20 The trial court vacated his 2003 assault conviction on double-jeopardy grounds.
 21 SCR, Exh. 1. In 2005, the Washington Court of Appeals reversed the vacation of the
 assault conviction, vacated the conviction for attempted murder, reversed exclusion of
 22 the juvenile adjudication in calculating his offender score, and remanded for
 resentencing. *State v. Weber*, 112 P.3d 1287 (Wash. Ct. App. 2005). In 2006, the

23
 24 ³ [Washington State Supreme Court footnote] While serving his sentence, Weber was convicted
 25 of second degree assault against another inmate and sentenced as a persistent offender to life without the
 26 possibility of early release. *State v. Weber*, 137 Wash.App. 852, 155 P.3d 947 (2007). This case involves
 a challenge to one of Weber's strike offense convictions.

1 Washington Supreme Court affirmed in a published opinion. *State v. Weber*, 149 P.3d
 2 646 (Wash. 2006). In June 2007, the United States Supreme Court denied his petition for
 a writ of certiorari. (SCR, Exh. 14.)

3 Thereafter, Mr. Weber filed **two state personal restraint petitions** (“PRPs”), one
 4 before and one after filing the current **federal habeas petition**. In August 2007, Mr.
 5 Weber filed his **first PRP**. SCR, Exh. 15. The state court of appeals dismissed the first
 6 PRP (SCR, Exh. 17), and in September 2008, the state supreme court denied
 discretionary review (SCR, Exh. 19).

7 In November 2008, Mr. Weber filed his **federal habeas petition**. (Dkt. 1.) The
 8 Court appointed counsel for Mr. Weber and later allowed substitution of counsel. (Dkts.
 9 3, 7, 8, 9, 10, 16). A First Amended Petition was filed, discovery was completed, and an
 10 answer was filed when, in March 2010, Mr. Weber filed a Second Amended Petition and
 11 the parties were granted a stipulated motion to stay and abey so that Mr. Weber could
 return to the state courts to exhaust remedies based in part on new evidence of actual
 12 innocence. (Dkts. 37, 38, 39.)

13 In May 2011, Mr. Weber filed his **second PRP** before the state supreme court.¹ (Dkt. 73 (hereinafter “Supp. SCR”), Exh. 21.) In September 2012, the Washington
 14 Supreme Court issued a published opinion that dismissed Mr. Weber’s second PRP
 because (1) Mr. Weber failed to make a threshold showing of a gateway actual innocence
 15 claim such that the state statute of limitations was not equitably tolled to permit
 consideration on the merits of whether his trial counsel was constitutionally ineffective;
 16 and (2) the state supreme court declined to recognize a freestanding actual innocence
 17 claim and, were it to recognize one, would conclude that Mr. Weber necessarily could
 not succeed on such a claim given that he could not overcome the lower threshold of
 demonstrating gateway actual innocence. *In re Weber*, 284 P.3d 734 (Wash. 2012).

18 The stay on Mr. Weber’s federal habeas petition was lifted in late-2012, a Third
 19 Amended Petition was filed, and an answer and supplemental state court records were
 20 filed in early-2013. (Dkts. 69, 70, 71; *see* Dkt. 73 (hereinafter “Supp. SCR”)). The Court
 21 granted extensions of time for the parties to respond to briefing and granted a stipulated
 motion to expand the record. (Dkts. 75, 77, 84.) The Court also granted Mr. Weber’s
 22 unopposed motion for limited discovery so that he could propound subpoenas on
 Sacramento County, California police agencies in search of information about the person
 23 Mr. Weber proposes was the true shooter in the 2003 incident. (Dkt. 85.) The Court
 noted, however, that permitting such limited discovery “does not suggest that Mr.
 24 Weber’s request for an evidentiary hearing will be granted or that he may present the
 records he obtains for the first time to a federal court on habeas review.” (Dkt. 85, at 2.).

25
 26 R&R (Dkt. #92) at 3-5. Petitioner voluntarily dismissed his second, third, and fourth grounds for

1 relief during briefing. R&R (Dkt. #92) at 2. His remaining grounds for relief are:
 2 (1) Prosecutorial Misconduct; (5) Ineffective Assistance of Counsel; and (6) Freestanding Actual
 3 Innocence.

4 In his objection to the R&R, petitioner proposed Martinez as an alternate procedural
 5 mechanism to enable this Court to reach the merits of his IAC claim (ground for relief five).
 6 Objection (Dkt. #95) at 3. As this was not addressed in the R&R, the Court will determine
 7 whether petitioner can satisfy Martinez.

8 C. Standard of Review

9 The Antiterrorism and Effective Death Penalty Act (AEDPA), which applies to petitioner,
 10 mandates that

11 [a]n application for a writ of habeas corpus . . . shall not be granted with respect to
 12 any claim that was adjudicated on the merits in State court proceedings unless the
 13 adjudication of the claim (1) resulted in a decision that was contrary to, or
 14 involved an unreasonable application of, clearly established Federal law, as
 15 determined by the Supreme Court of the United States; or (2) resulted in a decision
 16 that was based on an unreasonable determination of the facts in light of the
 17 evidence presented in the State court proceeding.

18 28 U.S.C. § 2254(d). “‘Clearly established Federal law’ refers to the holdings, as opposed to the
 19 dicta, of the Supreme Court’s decisions.” Winzer v. Hall, 494 F.3d 1192, 1196 (9th Cir. 2007)
 20 (internal citations omitted). In order to grant relief, the district court must be convinced that “the
 21 state court’s decision is ‘more than incorrect or erroneous’ . . . [but] must be ‘objectively
 22 unreasonable.’” Id. (quoting Lockyer v. Andrade, 538 U.S. 63, 75 (2003)). For claims
 23 “adjudicated on the merits in State Court,” § 2254(d) limits the record to that which was before
 24 the state court. Stokley v. Ryan, 659 F.3d 802, 807 (9th Cir. 2011). However, newly presented
 25 evidence may be considered if petitioner raises a new ground for relief which was not
 26 adjudicated on the merits in state court. Id. at 809; see 28 U.S.C. § 2254(e)(2).

25 D. Ground One-Prosecutorial Misconduct

1 The Court adopts the R&R as to petitioner's first ground for relief as the alleged
 2 prosecutorial misconduct did not rise to a sufficient level to be "contrary to . . . clearly
 3 established Federal law." See 28 U.S.C. § 2254(d)(1).

4 **E. Ground Five-Ineffective Assistance of Counsel**

5 "When a petitioner fails to present a federal claim to the state court, the claim is
 6 unexhausted, and the petitioner must generally return to state court." Stokley, 659 F.3d at 809. A
 7 claim is, however, procedurally defaulted if the petitioner failed to exhaust and is now
 8 procedurally barred by the state court. Id. Petitioner raised the IAC claim in an untimely
 9 Personal Restraint Petition. Weber, 175 Wn.2d at 249. Petitioner has therefore procedurally
 10 defaulted his IAC claim unless "the prisoner can demonstrate cause for the default and actual
 11 prejudice as a result of the alleged violation of federal law, or demonstrate that failure to
 12 consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson,
 13 501 U.S. 722, 750 (1991). While initially attempting to excuse the procedural default solely
 14 through the "miscarriage of justice" exception, petitioner raised the Martinez exception to the
 15 Coleman "cause and prejudice" standard in a later pleading. See Objection (Dkt. #95) at 3; see also Martinez, 132 S. Ct. at 1319.

16 **1. Martinez "Cause and Prejudice"**

17 The Supreme Court has "announced an exception to the longstanding Coleman rule that
 18 ineffective assistance of PCR counsel cannot establish cause to overcome procedural default."
 19 Dickens v Ryan, 740 F.3d 1302, 1319 (9th Cir. 2014). The Court held:

20 Where, under state law, claims of ineffective assistance of trial counsel must be
 21 raised in an initial-review collateral proceeding, a procedural default will not bar a
 22 federal habeas court from hearing a substantial claim of ineffective assistance at
 23 trial if, in the initial review collateral proceeding, there was no counsel or counsel
 24 in the proceeding was ineffective.

25 Martinez v. Ryan, 132 S. Ct. at 1320. To establish "cause" for a procedural default under
 26 Martinez, a petitioner must show that "(1) the underlying ineffective assistance of trial counsel
 claim is 'substantial'; (2) the petitioner was not represented . . . during the PCR proceeding; (3)

1 the state PCR proceeding was the initial review proceeding; and (4) state law required . . . the
 2 petitioner to bring the claim in the initial review collateral proceeding.” Dickens, 740 F.3d at
 3 1319.

4 To satisfy the first prong of Martinez, “a prisoner must . . . demonstrate that the
 5 underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that
 6 the prisoner must demonstrate that the claim has some merit.” Martinez, 132 S. Ct. at 1318. “An
 7 IAC claim has merit where (1) counsel’s ‘performance was unreasonable under prevailing
 8 professional standards,’ and (2) ‘there is a reasonable probability that but for counsel’s
 9 unprofessional errors, the result would have been different.’” Cook v. Ryan, 688 F.3d 598, 610
 10 (9th Cir. 2012) (internal citation omitted). “Substantiality” requires a petitioner to demonstrate
 11 that “reasonable jurists could debate whether . . . the petition should have been resolved in a
 12 different manner or that the issues presented were adequate to deserve encouragement to proceed
 13 further.” Detrich v. Ryan, 740 F.3d 1237, 1245 (9th Cir. 2013) (internal citation omitted).

14 “[Strickland [v. Washington, 466 U.S. 668 (1984)] allows for a finding of ineffectiveness
 15 based on omissions, not just overt acts of counsel.” Vega v. Ryan, 735 F.3d 1093, 1096 (9th Cir.
 16 2013). “A lawyer who fails adequately to investigate, and to introduce into evidence, records . . .
 17 that raise sufficient doubt as to that question to undermine confidence in the verdict, renders
 18 deficient performance.” Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999). “A decision not to
 19 investigate ‘must be directly assessed for reasonableness in all the circumstances, applying a
 20 heavy measure of deference to counsel’s judgments.’” Vega, 735 F.3d at 1097 (internal citation
 21 omitted). “[A] court making the prejudice inquiry must ask if the defendant has met the burden
 22 of showing that the decision reached would reasonably likely have been different absent the
 23 errors.” Strickland, 466 U.S. at 696.

24 Without passing judgment on the merits of petitioner’s IAC claim, the Court finds that
 25 petitioner has satisfied the Martinez standard for “substantiality.” Based on petitioner’s list of
 26 alleged pre-trial and trial errors, Objection (Dkt. #95) at 5-6, the Court finds that “reasonable
 jurists could debate” whether petitioner’s trial-counsel performed deficiently. The Court finds

1 that petitioner's allegations that trial-counsel failed to adequately question the victim concerning
 2 his assailant's haircut,⁴ failed to present evidence that a phone area code tattoo is very common,
 3 failed to elicit testimony about the "Boxer" nickname,⁵ and failed to properly interview key
 4 witnesses meet the standard of "substantial" under Martinez. See id. Additionally, these errors
 5 potentially resulted in prejudice as they cast doubt upon the primary state witness's identification
 6 of petitioner. "[R]easonable jurists could debate" whether the "decision reached would
 7 reasonably likely have been different absent the errors." Petitioner therefore satisfies the
 8 Martinez "substantial" prong.

9 As petitioner was not represented during the first post-conviction relief proceeding, he
 10 has satisfied the second prong under Martinez. See Objection (Dkt. #95) at 6.

11 Petitioner has satisfied the third prong as the state post-conviction proceeding was the
 12 initial review for his ineffective assistance of counsel claims. See id. at 7.

13 To analyze the fourth prong, this Court must determine whether Martinez applies to the
 14 State of Washington. The Supreme Court has "slightly modified the fourth requirement to allow
 15 a finding of 'cause' where it is 'highly unlikely' that an IAC claim can be raised on direct
 16 appeal." Ha Van Nguyen v. Curry, 736 F.3d 1287, 1293 (9th Cir. 2013) (quoting Trevino v.
 17 Thaler, 133 S. Ct. 1911, 1921 (2013)). Washington State "regularly consider[s] such claims on
 18 direct appeal." State v McFarland, 127 Wn.2d 322, 388 n.5 (1995). This Court must therefore
 19 determine whether it is "highly unlikely" that petitioner's ineffective assistance of counsel claim
 could have been effectively raised on direct appeal.

20 The Washington Supreme Court does not mandate that IAC claims be raised in a personal
 21 restraint petition but has stated that "a personal restraint petition is the appropriate means of

22
 23 ⁴The victim Vasquez described his assailant as having a shaved head. Weber, 175 Wn.2d at 249.
 24 In his booking photo later the same day, petitioner had short dark hair. Id. at 251.

25 ⁵Vasquez stated that he knew his assailant by two nicknames: "Geuro Loco" and "Boxer."
 26 Weber, 175 Wn.2d at 260. There was however no evidence linking petitioner to the "Boxer" nickname.
Id.

1 having the reviewing court consider matters outside the record.” Id. “[T]he need to expand the
 2 trial court record” is a key factor supporting “initial consideration of [IAC] claim[s] during
 3 collateral, not on direct, review.” See Trevino, 133 S. Ct. at 1921. Petitioner’s IAC claim relies
 4 on evidence outside the record. Objection (Dkt. #95) at 8. Petitioner’s IAC claim includes
 5 allegations of sixteen specific instances of his trial-attorney’s conduct before or during trial that
 6 he claims show ineffective assistance and prejudice. Id. at 5-6. Of these sixteen allegations, the
 7 only one that could have been decided with evidence in the record is the allegation of the
 8 attorney’s failure to object at trial. This claim was already considered and dismissed on direct
 9 appeal in state court proceedings and therefore cannot be raised with this Court. See State v.
 10 Weber, 112 P.3d 1287, 127 Wn. App. 879, *893 ¶51-56 (Wash. Ct. App. 2005). However, all of
 11 petitioner’s other claims involve trial strategy and alleged errors of omission, including: failure
 12 to investigate the party, failure to interview potential or actual witnesses, failure to consider
 13 evidence of the shooter’s shaved head compared to the defendant’s haircut, failure to challenge
 14 the photo lineups, failure to adequately cross-examine and impeach the victim on the
 15 identification of the shooter, failure to present a timeline to the jury, failure to hire a gun expert,
 16 failure to present evidence that an area code tattoo is common, and failure to present evidence
 17 that the nickname “Guero Loco” is common. In order to determine whether these allegations
 18 constitute ineffective assistance of counsel, a court would need further evidence from outside the
 19 record that explains the trial-attorney’s strategy and omissions, the reasons behind these
 20 decisions, and how or why such decisions were prejudicial to petitioner. This Court therefore
 21 finds that, since direct appeal is not the appropriate venue for reviewing evidence outside the
 22 record in Washington, petitioner was denied a “meaningful opportunity to present a claim of
 23 ineffective assistance of trial counsel on direct appeal”⁶ for all but one portion of his IAC claim.

24 ⁶The Court notes similarities between Washington and Tennessee law as discussed in Morrow v.
 25 Brandon, No. 3:06-0955, 2014 WL 49817 (M.D. Tenn. Jan. 7, 2014). The court noted that “for the
 26 typical case in Tennessee’s system, the post conviction proceeding is the principal and most effective
 procedure to raise an ineffective assistance of counsel claim.” Id. at *9. This is comparable to
 Washington where, although defendants can and do raise successful IAC claims on direct appeal, see

1 See Trevino, 133 S. Ct. at 1921. Petitioner therefore satisfies the fourth Martinez prong.⁷

2 Petitioner argues that a showing of Coleman “actual prejudice” is unnecessary under
 3 Martinez. See Objection (Dkt. 95) at 6. Petitioner relies on Detrich, a plurality opinion which
 4 found that “[t]here is no need to show ‘prejudice’ resulting from the failure of the pro se prisoner
 5 during the state PCR proceeding to raise a claim of trial-counsel IAC, over and above the need to
 6 satisfy the first Martinez requirement that the underlying trial-court IAC claim be ‘substantial.’”
Detrich, 740 F.3d at 1245. “‘Prejudice’ for purposes of the Coleman ‘cause and prejudice’
 7 analysis in the Martinez context requires only a showing that the trial-level ineffective assistance
 8 of counsel claim was ‘substantial.’” Clabourne v. Ryan, __ F.3d __, No. 09-99022, 2014 WL
 9 866382, at *11 (9th Cir. March 5, 2014). This Court will therefore not require a showing of
 10 Coleman “prejudice” beyond substantiality. To demonstrate a substantial IAC claim, petitioner
 11 “must demonstrate that the claim has some merit.” Martinez, 132 S. Ct. at 1318. As discussed
 12 above, the Court has found that petitioner’s IAC claim is substantial. Petitioner has therefore
 13 demonstrated Coleman “prejudice” as defined by the Ninth Circuit.

14 The district court’s role is to “to determine . . . whether there is ‘cause’ to excuse . . .
 15 procedural default . . . [and if so to] then address on the merits the substantial trial-counsel IAC
 16 claims.” Detrich, 740 F.3d at 1248. “For procedurally defaulted claims, to which Martinez is
 17 applicable, the district court should allow discovery and hold an evidentiary hearing where
 18 appropriate to . . . determine, if the default is excused, whether there has been trial counsel IAC.”

20 e.g., State v. Kyllo, 166 Wn.2d 856, 859 (2009), IAC claims relying on evidence outside the trial record
 21 are most effectively brought in a post-conviction proceeding. See McFarland, 127 Wn.2d at 388 n.5.

22 ⁷ Other district courts that initially rejected Martinez on this basis have since reversed their
 23 stance following Trevino. See, e.g., Moore v. Stewart, No. 2:09-cv-02698-JPM-cgc, 2013 WL 4434371,
 24 at *3 (W.D. Tenn. Aug. 14, 2013); Brown v. Thomas, No. 2:11-CV-3578-RDP, 2013 WL 5934648, at
 25 *2 (N.D. Ala. Nov. 5, 2013); Raglin v. Mitchell, No. 1:00cv767, 2013 WL 5468227, at *7 (S.D. Ohio
 Sept. 29, 2013). Additionally, the post-Trevino Washington cases to address the issue have applied
Martinez without undertaking this analysis. See Dermendziev v. Uttecht, No. C13-0236-JCC, 2013 WL
 6243741, at *9 (W.D. Wash. Dec. 3, 2013); Yates v. Sinclair, No. C13-0842 RSM, 2014 WL 499003, at
 26 *3 (W.D. Wash. Feb. 7, 2014).

1 Id. at 1246. As petitioner has satisfied Martinez, he has demonstrated Coleman “cause and
 2 prejudice” to overcome the procedural default of his IAC claim. The Court therefore grants
 3 petitioner an evidentiary hearing on his fifth ground for relief.

4 **2. Actual Innocence Gateway**

5 The Court adopts the R&R’s conclusion that petitioner has not satisfied the standard for
 6 the actual innocence gateway exception.

7 Petitioner has asserted actual innocence to excuse the procedural default of his IAC claim
 8 by “implicating a fundamental miscarriage of justice.” See Schlup v. Delo, 513 U.S. 298, 315
 9 (1995) (internal citation omitted). In order to pass through the Schlup gateway, “the habeas
 10 petitioner [must] show that ‘a constitutional violation has probably resulted in the conviction of
 11 one who is actually innocent.’” Id. at 327 (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)).
 12 “To establish the requisite probability, the petitioner must show that it is more likely than not
 13 that no reasonable juror would have convicted him in light of the new evidence.” Id. This does
 14 not “merely require a showing that a reasonable doubt exists in the light of the new evidence, but
 15 rather that no reasonable juror would have found the defendant guilty.” Id. at 329. “[T]he
 16 District Court must assess the probative force of the newly presented evidence in connection
 17 with the evidence of guilt adduced at trial.” Id. at 331-32. The Supreme Court has cautioned,
 18 however, “that tenable actual-innocence gateway pleas are rare.” McQuiggin v. Perkins, 133 S.
 Ct. 1924, 1928 (2013).

19 The Court agrees with the R&R that petitioner’s newly presented evidence does not
 20 satisfy the “more likely than not” standard. See Schlup, 513 U.S. at 327. The declarations
 21 submitted years after the event by persons known to petitioner do not sufficiently undermine this
 22 Court’s opinion of the trial evidence for it to unequivocally conclude that “it is more likely than
 23 not that no reasonable juror would have convicted him.”⁸ See id.; cf. House v. Bell, 547 U.S.

24
 25 ⁸Petitioner’s newly discovered evidence consists of declarations. “[M]otions based solely upon
 26 affidavits are disfavored because the affiants’ statements are obtained without the benefit of cross-
 examination and an opportunity to make credibility determinations.” Herrera v. Collins, 506 U.S. 390,

1 518, 554 (2006) (allowing gateway claim where petitioner called into question the credibility of
 2 forensic evidence as well as presented substantial evidence pointing to a different suspect).

3 Petitioner has therefore failed to carry the high burden imposed by Schlup.

4 **F. Ground Six: Freestanding Actual Innocence**

5 The Court adopts the R&R's conclusion that petitioner's sixth ground for relief be denied.
 6 The Supreme Court has never recognized a freestanding actual innocence claim,⁹ and as such it
 7 cannot qualify as "clearly established Federal law" for the state court to act "contrary to." See 28
 8 U.S.C. § 2254(d)(1). This Court is therefore unable to grant habeas relief on petitioner's sixth
 9 ground for relief.

10 **G. Certificate of Appealability**

11 Petitioner may appeal a district court's dismissal of his federal habeas petition only after
 12 obtaining a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability may
 13 be issued upon "a substantial showing of the denial of a constitutional right." 28 U.S.C.
 14 § 2253(c)(2). The standard is satisfied by "demonstrating that jurists of reason could disagree
 15 with the district court's resolution of his case or that the issues presented were adequate to
 16 deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).
 17 The Court grants a certificate of appealability only for petitioner's ground five gateway actual
 18 innocence claim, as recommended by the R&R. See R&R (Dkt. #92) at 30.

19 **III. CONCLUSION**

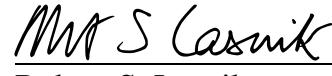
20 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
 21 and the remainder of the record, this Court hereby finds and ORDERS:

22 _____
 23 417 (1993). This principle, when applied to petitioner's declarations, further undermines the newly
 24 presented evidence's influence.

25 ⁹Herrera recognized that executive clemency was the "traditional remedy for claims of innocence
 26 based on new evidence." Herrera, 506 U.S. at 417. Further, as the "threshold showing for such an
 assumed right would necessarily be extraordinarily high," id., it is highly unlikely that petitioner could
 satisfy this standard even if freestanding actual innocence was a tenable claim.

- 1 (1) The Court partially adopts the R&R (Dkt. #92) as explained above.
2 (2) The Court grants petitioner an evidentiary hearing on ground five for relief, ineffective
3 assistance of counsel, for those claims listed herein that could not have been raised on direct
4 appeal because they rely on evidence outside the record.
5 (3) Petitioner's remaining grounds for relief in his federal habeas petition (Dkt. #70) are
6 DENIED.
7 (4) A status conference has been scheduled for **Wednesday, April 30, 2014 at 11:00am** in the
8 courtroom 15106 of the United States Courthouse, 700 Stewart Street, Seattle, Washington.
9 (4) The Clerk is directed to forward a copy of this Order to all counsel of record.

10
11 DATED this 28th day of April, 2014.

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13 
14 Robert S. Lasnik
15 United States District Judge
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